Before the Appellate Tribunal for Electricity
Appellate Jurisdiction, New Delhi

Appeal No. 48 of 2007 and 61 of 2008

Dated : 06th November, 2009

Present: **Hon'ble Mrs. Justice Manju Goel, Judicial Member**
Hon'ble Mr. H. L. Bajaj, Technical Member

IN THE MATTERS OF:

Appeal No. 48 of 2007:

The Chhattisgarh State Power Distribution Company Ltd.
Vidyut Seva Bhawan, 3rd Floor,
Dangania, Raipur,
Chhattisgarh … Appellant(s)

Vesus

1. **Chhattisgarh Hydro Power (P) Ltd.**
   "ABHIVADAN" Panchsheel Nagar,
   Raipur- 492 001, Chhattisgarh

2. **Chhattisgarh State Electricity Regulatory Commission**
   Old Chhattisgarh College Building,
   Civil Lines, GE Road,
   Raipur – 492 011
   Chhattisgarh … Respondent(s)

Counsel for the Appellant(s) : Mr. Ravi Shankar Prasad, Sr. Adv.
Ms. Suparna Srivastava, Adv.,
Mr. Neeraj Gupta, Adv.
Ms. Nidhi Minocha, Adv.

Mr. Aditya Shankar, Adv.
Mr. Arun Bhatnagar, SE

Counsel for the Respondent(s) : Mr. M.G.Ramachandran,
Ms. Swapna Seshadri,
Mr. Anand K. Ganesan,
Mr. Mridul Chakravarty, Advs.
for CSERC

Mr. Sanjay Sen, Ms. Shikha Ohri, Ms. Mandakini Ghosh, Ms. Ruchika Rathi, Mr. Rana S. Biswas, Mr. Manoj Madhavan, Advs. For Chhattisgarh Hydro Power Pvt. Ltd.

Appeal No. 61 of 2008:

The Chhattisgarh State Power Distribution Co. Ltd.
Vidyut Sewa Bhawan, 3rd Floor,
Danganiya, Raipur (Chhattisgarh)
Through its Managing Director … Appellant(s)

Versus

1. **Chhattisgarh State Electricity Regulatory Commission**
   Civil Lines, G.E. Road,
   Raipur (Chhattisgarh) – 492 001

2. **Chhattisgarh Biomass Energy Developers Association**
   C-33, Third Floor, Ashoka Millennium,
   Ring Road No.1, Rajendera Nagar Chowk,
   Raipur (Chattisgarh) 492 001
   Through its Secretary

3. Government of Chhattisgarh
Through its Principal Secretary (Energy)
Mantralaya, DKS Bhawan,
Raipur (Chhattisgarh) 492 001

4. Chhattisgarh Renewable Energy Development Agency
MIG-A/20-1, Sector-1, Shankar Nagar,
Raipur, Chhattisgarh – 492 001
Through its Secretary

5. M/s Jindal Steel & Power Ltd.
Kharsia Road, P. B. No. 16,
Raigarh (Chhattisgarh) 496 001

6. M/s. Bhilai Steel Plant
Through: General Manager (Elect.),
Bhilai, Distt.
Durg (Chhattisgar) 491 001 … Respondent(s)

Counsel for the appellant(s) : Mr. Ravi Shankar Prasad, Sr. Advocate,
Ms. Suparna Srivastava,
Advocates, Mr. Aditya Sharma

Mr. Arun Bhatnagar, SE

Counsel for the respondent(s) : Mr. M. G. Ramachandran,
Mr. Anand K. Ganesan and
Ms. Swapna Seshadri and
Mr. S. Patra, Advs. for CSERC

Mr. Gopal Choudary, Adv. For Resp. 2

Mr. Avinash Menon for JSPL, Resp. No. 5

Mr. E. Rajeev, Sec. Biomass Assn.

J U D G M E N T

Justice Manju Goel, Judicial Member

Introduction:

These are two appeals filed by Chhattisgarh State Power Distribution Company Ltd which is a successor of Chhattisgarh State Electricity Board, challenge two orders of the Commission. The appeals were heard together as they raise similar issues and are being disposed of by this common judgment.

Appeal No. 48 of 2007:

02) The appeal is directed against the order of Chhattisgarh State Electricity Regulatory Commission (the Commission for short) dated 28.02.07 passing a general order fixing norms for determination of sale price of power generated by small hydel plants and other related issues for promotion of hydel power.

03) The order of the Commission dated 28.02.07 was passed on the petition of M/s. Chhattisgarh Hydropower Pvt. Ltd. who had started work on the proposed 9.9 MW hydro power project known as Gullu Hydro Project seeking determination of tariff.

Subsequently the appellant further prayed for fixing norms for determination of sale price of power generated by small hydel plants and related issues of promotion of this source of renewable energy as mandated by the National Electricity Policy. The petitioner's project was the first project for development of Hydel power in the private sector. In view of generality of the issues involved and the need for wider consultation, the Commission floated a discussion paper on tariff and other related issues. A discussion paper was floated for obtaining comments from the State Govt. CREDA, the Chhattisgarh State Electricity Board and other distribution licensees. The Commission conducted a public hearing in which the main issues were identified in the public hearing.

04) The Commission thereafter passed the impugned order. The gist of the order has been given in the last two paragraphs of the order and is quoted below:

> *"**20.** The gist of the Commission's above orders are as follows:*
>
> *(i) <u>Mandatory minimum purchase of power:</u> Distribution licensees shall procure power from small hydel power projects to the extent of 3% of their total consumption in a year on the first-cum-first serve basis at a tariff as may be determined by the Commission.*

(ii) *Determination of tariff:* *Tariff shall be determined separately for each project and shall be single part tariff. Procurement by the licensee shall be without applying merit order despatch.*

(iii) *Wheeling charges:* *6% wheeling charges shall be payable by hydro generators if the power is taken through the licensee's grid for own use or sale to any consumer.*

(iv) *Cross-subsidy surcharge:* *The rate for cross-subsidy surcharge shall be 50% of the normal rate fixed by the Commission.*

(v) *Banking facilities:* *Banking facility is allowed subject to payment of difference of UI charges between the time of injection and time of drawal of power and payment @ 2% of the input banked energy.*

(vi) *Demand charges payable for availing start up power and mode of payment thereof:* *Demand charge for start up power will be as per the prevailing tariff order.*

(vii) *Security deposit:* *This is to be settled between the power producer and consumer bilaterally.*

(viii) *Sharing of demand charges:* *This is not allowed.*

(ix) *Sharing of expenditure on grid interface/transmission line:* *This will be as per the*

State Government policy notified on 28/08/02 and subsequent amendment.

(x) *Term for PPA:* *Period of PPA will be for 10 years from the date of commercial operation with provision for renewal for a further period of 10 years.*

(xi) *Application for tariff determination:* *Developers may make application for provisional tariff before 6 months from the anticipated date of commercial operation and fresh application for determination of final tariff within 12 months after the date of commercial operation.*

(xii) *Scheduling of energy:* *No scheduling of energy is required if entire generated power is sold to the licensee. But if the promoter sells power to a third party and/or supplies to captive user, then daily scheduling will be necessary.*

21. *This order shall be applicable to all small hydel projects upto a capacity of 25 MW. It will be reviewed after a period of five years. Such a review the Commission feels is necessary considering that not a single project has come up in the State so far and some projects are likely to come up in three years and will offer operational data of some certainty only thereafter."*

05) The appellant is a distribution licensee and is made to purchase 3% of the total consumption of electricity in a year from the small hydel power projects. Further, other commercial measures provided by the impugned order to the small hydel power projects are against the interest of the distribution licensee and hence the appeal.

06) The grounds raised in the appeal can be stated briefly as under:

The impugned order is contrary to the provisions of the Electricity Act, 2003 (the Act for short) and National Electricity Policy (NEP for short), framed under the Act as also against orders of this Tribunal. The Act and the NEP as well as State Government Policy have made provisions for promotion of power from non-conventional sources. Any concession and relaxation beyond such provisions need to be accompanied by financial assistance/subsidy from the State Government so that the commercial viability of the appellant is not adversely affected. Section 61(b) & (d) requires the State Commissions to ensure that one sector is not promoted at the cost of the other. But the extra relaxation given by the impugned order puts additional burden on the appellant. While fixing wheeling charges at 6% of the energy put into the system by small hydel projects the Commission has failed to appreciate that in wheeling of power at least energy loss has to be compensated to the

extent of average pooled losses. While fixing cross subsidy level at 50% of the rate prescribed by the Commission, the Commission has failed to appreciate that cross subsidy is levied in view of revenue compensation payable to the licensee for the consumers taken away by a generator and other supplier of electricity from the area of licensee. If compensation is not made fully effective it is bound to result in further increase in the level of cross subsidy amongst the consumers of the licensees which will be contrary to the basic theme of the Act. Since cost of power varies with time and availability in the power system the provision of energy banking will adversely affect a distribution licensee. Energy banking is neither essential nor a commercially viable process for electricity supply. The directions in the impugned order for grid connectivity is inconsistent with the existing provisions for connectivity with the grid provided under the Chhattisgarh Grid Code 2006 and therefore against the Regulations in force. The appellant therefore, prays that the impugned order is set aside and the contentions of the appellant on the issues enumerated above be accepted.

Appeal No.61 of 2008:

07) The appeal No. 61 is directed against the order of the Commission dated 16.01.08 when the Chhattisgarh Biomass Developers Association, the respondent No.2 in the appeal, filed a petition for determination of tariff at which the Chhattisgarh State

Electricity Board the appellant herein was to purchase power from the Members of the petitioner association.

08) Initially the Commission passed tariff order for the period on 11.11.05 for Biomass Energy Developers Association which came to be challenged before this Tribunal. This Tribunal decided the appeal, being No. 20 of 2006, remanding the matter to the Commission directing it to re-determine the tariff. By that judgment dated 15.01.07 in appeal No. 20 of 2006, this Tribunal adopted the Central Electricity Authority's (CEA) recommendations regarding – (a) capital cost, (b) O&M expenses, (c) Auxiliary power consumption, (e) Plant Load Factor, (f) Depreciation and (g) Specific fuel consumption. On wheeling charges, this Tribunal ruled that the reasonable cost to be borne by the appellant herein would be met by a charge of 3% of the power wheeled. The price of Biomass, mainly Rice – husk was considered to be Rs.850/- per MT and supplementary fuel of 25% viz. coal was also directed to be considered as fuel cost. Further an escalation at the rate of 5% p.a. was provided with a suggestion to develop a mechanism of fuel cost adjustment. The request that the demand charges collectable from respective HT consumers (i.e. third party sales) to be shared prorata to the energy supplied by each of them to the consumers was rejected. The Commission was directed to reconsider reducing cross subsidy surcharge for purchases directly from the generator through open access. It was also ruled that no demand charge for

startup power for the non-conventional energy plants be taken for the initial 5 years and thereafter the charge can be levied on a gradual basis up to 50% of the demand charges applicable to conventional plants. The Commission's direction that distribution licensee in whose area there is no biomass based power, producer may seek exemption from the mandatory purchase of 5% was set aside. Certain directions were given to rationalize the process of energy banking as well as price of energy exported in deviation with the schedule. The Commission was accordingly, directed to determine the tariff afresh. Findings of the Commission which had not been confirmed by us came to be challenged before the Supreme Court in appeal No. 12 of 2007 in which the Supreme Court passed an order on 15.01.07 which is as under:

> "*Heard both sides.*
>
> *As the matter has been remitted to the Commission, we are not inclined to interfere with the impugned order. Accordingly, the civil appeal is dismissed. However, we make it clear that the State would be at liberty to raise all the contentions before the Commission and the Commission shall decide the same, untrammeled by any observations made in the impugned judgement" (Emphasis added)."*

09) In compliance with the order of this Tribunal and of the Supreme Court dated 07.09.06 and 15.01.07 respectively the Commission proceeded to re-determine the tariff vide the impugned order. The Commission observed that the Commission's earlier findings were not confirmed by this Tribunal. The same can be seen in paragraph 4 of the impugned order which is as under:

> *"4. The earlier findings of this Commission which have not been confirmed by the Hon'ble ATE are as follows:-*
>
> *(i) With regard to tariff for purchase of power by the distribution licensees, the Hon'ble Tribunal has directed the Commission to determine tariff as per norms recommended by the CEA for biomass-based generation plants (para 12 of the judgement). The operational norms as recommended by the CEA, which the Commission has been directed to follow in determination of tariff, ar as under:-*
>
> *(a) Capital cost @ Rs.4 Cr. per MW*
> *(b) O&M expenses including insurance to be 7% of the cost of capital with the annual escalation @ 5%*
> *(c) Auxiliary consumption to be taken as 10%*

(d) *Normative Gross Heat Rate (Kcal/kwh) – 4500 (Station Heat Rate to be taken based on the actual PG Test report of the projects)*

(e) *PLF of 80% for recovery of the full fixed cost*

(f) *Depreciation @ 7.84% p.a. until the debt is repaid. Beyond that 20% is to be spread over the remaining life of the plants (As permitted by the Govt. of India notification relating to Depreciation norms for generating companies dated 29.3.1994)*

(g) *Specific fuel consumption of 1.36 kg/Kwh in the average calorific value of fuel as 3300 cal/kg)*

(ii) The ATE has directed that the fuel cost for rice-husk be taken as Rs.850 per ton in the first year for the 75% of the fuel i.e. rice husk and the price of the supplementary fuel i.e. coal permissible for use at 25% be also taken to obtain the aggregate cost of fuel (para 16 of the judgement)

(iii) It has been directed that the Commission develop a mechanism for fuel cost adjustment so that

the variation in cost on actual basis is taken into account (para 16 of the judgement).

(iv) It has been directed that the Commission examine 'the efficacy of dispensing with' cross subsidy surcharge or lowering the rate further, against the Commission's order that cross subsidy surcharge be reduced by 50% (para 18 of the judgement)

(v) The ATE has directed that banking be permitted and the Commission examine and arrive at a suitable formulation and adoption for such banking (para 22-24 of the judgement).

(vi) It has been directed that capping at 105% of the scheduled energy be relaxed and supply be regulated in a manner that 'the annual average PLF does not exceed 100%' (para 25 of the judgement)."

10) The Commission accordingly re-considered the matter and passed the impugned order. The Commission in the impugned order came out with its decision on various aspects viz. fuel cost, fuel cost adjustment, station heat rate, O&M cost, depreciation, wheeling charges, banking of energy, cross subsidy, demand charge

for startup power, setting of energy and scheduling of power by licensees, and computed tariff for the biomass generating plants upto 15 MW capacity. The Commission fixed the wheeling charges at 3%, cross subsidy surcharge at 50%, demand charge for startup power nil for the first 05 years, and 5% of the energy consumption of the appellant to be purchased from Biomass plants. The Commission further directed that no demand charge being payable for startup power for the first five years the appellant Board shall re-fund the amounts collected under that head to be refunded. The rates of fixed charges and energy charges were mentioned in schedules A2, energy charges for fuel mix ratio of 75:25 (75% biomass and 25% coal) A3 energy charges for fuel mix ratio of 85:15 (85% biomass and 15% coal), B1 tariff of biomass generators for fuel mix of 75:25 (75% biomass and 25% coal), C2 tariff of biomass generators for fuel mix ratio of 85:15 (85% biomass and 15% coal). The fixed charges were computed with relation to n^{th} year of commercial operation and the energy charges were computed for 2005-06 to 2014-15 for the generators with fuel mix of 75:25 and for 2007-08 to 2014-15 for the generators with fuel mix of 85:15. The Commission further ruled that the above parameters would be applied for the base year 2005-06 and would be reviewed after five years from the base year except for O&M expenses which would be reviewed after 3 years from the base year

11) Considering the objections of the appellant in regard to banking, particularly with reference to the ABT regime, the Commission directed that banking be permitted but the generator should compensate the appellant by paying the difference between the cost of the power withdrawn during peak hours and the power deposited during the off-peak hours determined. The Commission directed that banking would be permitted only in case of those plants which have not entered into agreement with the appellant Board for supply of the entire energy generated and subject to the condition that the generator installs ABT meters. Further the period of banking was limited to three months and banking charges were determined at 2% of the banked energy per month. The impugned order further holds that the order would not interfere with the agreements entered into before coming into operation of the Act. All agreements entered into after the order dated 11.11.05 i.e. the earlier order of the Commission would stand modified by the impugned order.

12) The appellant has challenged the Commission's findings on all the above items. It further challenges the order on various grounds as under:

(a) Section 62(1) makes provision for determination of tariff by a generating company to a distribution licensee and thus the Commission has erred in determining tariff for

all biomass energy developers as a class. Tariff for each generating company has to be determined on the basis of its project cost along with enumerable components and variables, the technology used etc. and therefore the tariff for each generating company has necessarily to be distinct and different from the tariff which can be fixed for other generating company. Although the type of fuel used may be the same. Fixing a common tariff for all biomass producers of 15 MW capacity would result in equating the tariff for a 2 MW plant with that of 15 MW plant which will be to the disadvantage of the appellant who is made to purchase a specified amount of electricity from the biomass energy generators.

(b) The tariff order has gone beyond the promotional measures prescribed by the policy directives of the State Government, the National Electricity Policy as well as the Act. The incentives provided by the State Government are already quite substantial. Therefore, further promotional measures like reduction in cross subsidy surcharge, concessional wheeling charges and banking of energy in the form of concession given in the impugned order are uncalled for.

(c) The direction of the Commission requiring biomass generators to pay energy charges only for startup power

without payment of demand charges is arbitrary and unreasonable and is discriminatory in favour of biomass generators as compared to other generators using the appellant's power in startup purposes.

(d) Further applying order retrospectively causes financial injury to the appellant.

Decision with reasons:

Government policy and the legal framework:

13) Before we proceed further it will be worthwhile to recall the policy of the Government towards development of non-conventional energy sources and renewable sources of power. Power generated with renewable sources of fuel is not only environment friendly but is also conducive to preservation of fossil fuel which is not going to last forever. Although the initial cost of power generation from such sources may appear to be higher in terms of money, in real terms, when the impact of environment and on world's stock of fossil fuel is taken into consideration, is much less. Following international initiative treaties and protocols the Government of India issued guidelines for promotional and fiscal incentive by State Governments in '94-95 which provided, inter alia, for purchase of electricity at a minimum of Rs.2.25 per unit by State Electricity Boards with '94-95 as the base year and with escalation at minimum rate of 5% year on year. The guidelines also made

provisions for sale of electricity to third parties, wheeling charge at 2% as well as banking of power. The Government of Chhattisgarh issued policy directives on incentives to units generating power from non-conventional sources on 08.04.02 which, inter alia, provided for purchase of power by State Electricity Board (the appellant herein) at Rs.2.25 per unit and wheeling at rates to be determined by the Board without any compensation from State Government. The Board fixed the wheeling charge at 3%. The price of power was subject to review from time to time. The Act also encourages promotion of co-generation and generation of electricity from renewable energy. In the preamble of the Act it has been envisaged that one of the purposes of the Act is "*promotion of efficient and environmentally benign policies*". Section 86(1)(e) of the Act brings a statutory obligation on the State Electricity Regulatory Commissions to promote co-generation and generation of electricity from renewable sources of energy. The relevant provision is as under:

> "***86. Functions of State Commission.-*** *(1) The State Commission shall discharge the following functions, namely, -*
>
> *(a) …*
>
> *(b) …*
>
> *(c) …*
>
> *(d) …*

(e) Promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

(f) …

(g) …

(h) …"

14) Section 61 which deals with tariff also provides that the Commission shall specify the terms and conditions for determination of tariff and in doing so shall take into consideration the measures to promote co-generation and generation of electricity for renewable sources of energy. The relevant provision is as under:

"***61. Tariff regulations.*** *– The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-*

(a) …

(b) …

(c) …

(d) …

(e) …

(f) …

(g) …

(h) The promotion of co-generation and generation of electricity from renewable sources of energy;

(i) …"

15) The National Electricity Policy notified by Government of India on 12.02.05 in exercise of its power under section 3 of the Electricity Act 2003 also deals with co-generation and non-conventional energy sources. The relevant portion of the National Electricity Policy is as under:

"15.2 COGENERATION AND NON-CONVENTIONAL ENERGY SOURCES

5.12.1 Non-conventional sources of energy being the most environment friendly there is an urgent need to promote generation of electricity based on such sources of energy. For this purpose, efforts need to be made to reduce the capital cost of projects based on non-conventional and renewable sources of

energy. Cost of energy can also be reduced by promoting competition within such projects. At the same time, adequate promotional measures would also have to be taken for development of technologies and a sustained growth of these sources.

5.12.2 The Electricity Act, 2003 provides that co-generation and generation of electricity from non-conventional sources would be promoted by the SERCs by providing suitable measures for connectivity with grid and sale of electricity to any person and also by specifying, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee. Such percentage for purchase of power from non-conventional sources should be made applicable for the tariffs to be determined by the SERCs at the earliest. Progressively the share of electricity from non-conventional sources would need to be increased as prescribed by State Electricity Regulatory Commissions. Such purchase by distribution companies shall be through competitive bidding process considering the fact that it will take some time before non-conventional technologies compete, in terms of cost, with conventional sources,

the Commission may determine an appropriate differential in prices to promote these technologies.

5.12.3 Industries in which both process heat and electricity are needed are well suited for co-generation of electricity. A significant potential for co-generation exists in the country, particularly in the sugar industry. SERCs may promote arrangements between the co-generator and the concerned distribution licensee for purchase of surplus power from such plants. Co-generation system also needs to be encouraged in the overall interest of energy efficiency and also gird stability."

Finding on specific issues:

16) The members of Chhattisgarh Biomass Developers Association had entered into agreements with the appellant Board for sale of power from their plants at a price of Rs.2.25 per unit apart from wheeling charge of 3% of energy exported and sale to third parties. The Association approached the Commission for still further concessional terms in their sale to the Board which led to the first order dated 11.11.05 being passed (mentioned in paragraph 7 supra).

Can tariff be fixed for a class of generators?

17) Challenging the impugned order, the first point submitted by Mr. Ravi Shankar Prasad counsel for the appellant is that tariff cannot be determined on a "class petition" for a group of generating companies which may be identical on certain parameters but for which tariff determined on the basis of the capital cost as well as numerous other variables cannot be the same. He has laid stress on the use of the word "a" used in section 62 which says that "The *appropriate Commission shall determine tariff in accordance with the provisions of this Act for- supply of electricity by "a" generating company to a distribution licensee (*emphasis applied*)."* He, however, agrees that if some generating companies work on the same parameters the Commission would be justified in fixing a tariff which can be applied for the energy generated by all members of such group.

18) The Commission has ruled in the matter of hydro generation that the tariff for each hydel project will have to be determined separately. In the case of hydel project, in the order dated 27.02.07 impugned in appeal No. 48 of 2007, the Commission has enumerated various factors which make it difficult to decide on a general tariff. For example, it says that PUF for canal side projects vary widely, that there is considerable variation in civil works required for each project resulting in variation in various costs, the type of turbine use, RPM of generator, type of excitation system etc. also contribute to the cost of the project which vary from site to site

and further that there may be geographical surprises which come to notice only when the project work is in progress. The Commission concluded "*in view of the above, it would not be feasible to decide general tariff for all small hydel projects. The Commission, therefore, decided to determine tariff separately for each project."* The appellant wants a similar order for the biomass energy generators.

19) While it is true that for biomass producers the variation from project to project is far less compared to the hydel generators, some variations from project to project cannot be ruled out. In the case of hydel generation the very site of generation is the factor affecting the cost of the project. In the case of biomass producers, particularly if all generators are using rice husk, the differences from project to project will be far less. Nonetheless we cannot lose sight of the fact that the scale of the project itself will be a cause for variation in the average cost of production. Further there may be other factors involving the technology used, the cost of labour etc. It cannot be denied that the capital cost for a 2 MW project will not be proportionately same as the capital cost of 15 MW project. In fact, the average cost of production for a 15 MW project is likely to be far less than the capital cost of the 2 MW project or of a 7 MW capacity which is the basis of the estimates. In this way the appellant may stand to gain if the project of 2 MW capacities is made to supply at the same rate as a 15 MW project.

20) In a recent appeal before this Tribunal a common tariff for hydel projects determined by the Himachal Pradesh Regulatory Commission came to be challenged before us by the generators as they felt that the capital cost for the projects being so different fixing a common tariff was not attractive enough for the smaller units. In that matter namely appeals No. 50 & 65 of 2008 we directed that the capital cost fixed by the Commission may be treated to be normative in all cases as are found suitable by all parties and in case normative tariff is not suitable to the generating company or the distribution licensee they would be entitled to approach the Commission for a project specific fixation of tariff. We think that we can make the same dispensation in the present appeal. The Commission has decided upon the common tariff based on the available data. For those biomass energy generators to whom the impugned tariff is suitable need not apply separately for fixing of tariff. However, both the distribution licensees namely the appellant and the respondent No.5 will be entitled to apply for fixing of tariff for a specific biomass generating station in case they feel that the impugned tariff is more/less than what can legitimately be determined under the Act and the Regulations.

Cross subsidy surcharge, banking, demand charge:

21) So far as the benefit given in respect of cross subsidy surcharge, banking, demand charges, connectivity with the grid etc. are concerned, the common plea taken by the appellant in the two

appeals is that the promotional measures in these regards are far beyond what are prescribed by section 86 (1) (e) of the Act, read with the National Electricity Policy. It is contended that section 86 (1) (e) requires *promotion of co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of total consumption of electricity in the area of a distribution licensee"* It is analysed, therefore, that the only promotional measure that can be taken are limited to (i) connectivity with the grid and for sale of electricity to any person, (ii) mandatory purchase of a specified percentage of power by the distribution licensee in the area of supply and (iii) differential tariff till the non-conventional power cost become competitive. Attention is drawn to the provision of section 63 of the Act which directs the appropriate Commission to adopt the tariff if such tariff is determined through a transparent process of bidding. The tariff policy also prescribes that future procurement by distribution licensees from non-conventional power producers shall be done as far as possible through competitive bidding. It is also submitted that promotional measures cannot be undertaken to benefit one class of power generators at the cost of any other player in the electricity sector. In other words, the appellants would like promotional measures so long as the effect of such promotional measures does not fall on the distribution licensees. On behalf of

the respondent it is submitted that while providing for connectivity with the grid, the Commission can make provisions for concessional measures for wheeling and banking as well. The appellant contends that the concessional charges for wheeling and dispensation for banking adversely affect the distribution licensee and therefore not permissible in the name of providing connectivity as warranted the section 86 (1) (e) of the Act.

22) It is not disputed that the Act requires promotion of production from non-conventional sources as well as from renewable sources of energy. We have to interpret provisions of 61 (1) (e) keeping in view the broad picture requiring promotion of development of energy from renewable sources. Read in the context of the bigger picture, section 86 (1) (e) has to be read liberally. We should not read 86 (1) (e) to say that promotion of renewable sources of energy cannot be done by any method except through connectivity with the grid, sale of electricity to any person and providing for mandatory purchase by the distribution licensees. If development of energy from renewable sources of fuel has to be encouraged the incentives necessarily will fall on others. Nothing can be achieved out of nothing. If some promotional measures are adopted to encourage the non-conventional energy producers necessarily the distribution licenses will have to bear with it. We also have to remember that the distribution licensees are themselves entitled to recover their own cost of purchase and

distribution. The Commission's are required to strike a balance between the measures to promote generation from the renewable sources of energy and the commercial viability of distribution licensees. We are not in agreement with the plea of the appellant that it is not permissible for the Commission to take any measures like reduction in cross subsidy charges, banking, concessional measures for demand charges etc. All that the appellant and other distribution licensees can claim is protection of their own interest namely recovery of their own cost including return to equity.

23) In the light of the above analysis we can proceed to examine whether the Commission's impugned order regarding wheeling, cross subsidy charges, banking and demand charges can be sustained on scrutiny. So far as banking is concerned, the Commission's order has taken into consideration the interest of the transmission and distribution licensees. As mentioned earlier the Commission has taken note of the ABT mechanism in place. It has directed that banking can be permitted only when the generator is able to compensate the distribution licensees/transmission licensees by paying the difference between the cost of power withdrawn during peak hours and the power deposited during off peak hours. Further it has limited the facility of banking to a period of three months. Further a banking charge to the extent of 2% of banked energy has also been imposed. In our view the Commission has, in this manner adopted the promotional measure

for the non-conventional energy developers and renewable energy developers without affecting the interest of the distribution and transmission utilities. The appellant has not been able to show that despite the corresponding favourable measures for the distribution licensees the provision of banking has adversely affected the distribution licensees. Accordingly, we are not inclined to interfere with the Commission's dispensation regarding banking.

24) Similarly, for the hydel projects banking has been allowed subject to payment of difference of UI charges between time of injection and time of drawal of power and payment at the rate of 2% of the input banked energy. For the same reason as in the previous paragraph we find that it is not necessary to interfere with the Commission's dispensation on banking for the hydel projects.

25) Wheeling charges has been fixed at 3% for biomass energy producers. It is contended that such charge is not sufficient to take care of transmission losses and so the appellant is not being compensated for the loss of energy in the process of wheeling. The objection of the appellant is not sustainable when we take into account the practical situation. The appellant has mentioned average loss of energy to the extent of 10%. However, this estimate is the estimate of pooled losses. The energy produced by the smaller units of 2 MW to 15 MW capacities is sold to consumers which are located within short distances from the generating plant.

It is not accepted that in transmitting energy within such short distances the loss in transit will be to the extent of 10%. The Commission fixed the wheeling charge at 3% for the respondents keeping in view this particular factor. In our earlier judgment also we had directed that the wheeling charge for the respondents be limited to 3%. The Commission as per direction of the Supreme Court has considered the plea of the appellant and for good reasons has fixed the wheeling charges for the respondent biomass electricity generators at 3%. In our view the wheeling charge is not so unreasonable as to warrant an interference. Accordingly, the challenge to this extent is rejected. For the hydel producers the wheeling charges fixed is 6%. For the same reasons as above, we reject the challenge to the wheeling charge for hydel generators.

26) The cross subsidy surcharge payable by respondent, NCE Developers & hydel generators has been reduced by 50%. It is contended that the loss caused by a reduction in cross subsidy for the respondents will necessarily mean increase in cross subsidy for other consumers. It is stated that this is against the provision of the Act which requires cross subsidy to be gradually reduced. The appellant has not given us any data which can show that the reduction of cross subsidy surcharge for biomass generators had caused any substantial increase in the cross subsidies for the other consumers. There is no doubt that the distribution licensees must be compensated, for the loss caused by the reduction of cross

subsidy surcharge, payable by biomass developers. It does not appear to us that any consumer category has faced any shocking increase in its tariff on account of the reduction of cross subsidy surcharge on biomass developers. As stated earlier so long as the distribution licensee/transmission licensee is able to recover its cost and return, it should not grudge such promotional measures which are in the interest of the electricity sector in particular and in the interest of nation in general. We therefore decline to interfere with the Commission's decision on such charge.

27) The Commission has directed that so far as demand charge of startup power for biomass energy developers is concerned, for the first five years the charge would be nil. The distribution licensee is entitled to charge and recover the energy charge for recovery of startup power. Now the startup power is required in small quantity and in small duration. The startup power is imported from the same line as for the export. The connectivity to the grid is established at the cost of biomass plants. The facility of no demand charge for startup power for the first five years of the plant is a promotional measure. The Commission has to be left with some discretion to take promotional measures for the biomass producers. In our opinion the decision of the Commission in this regard is not so arbitrary as to require an interference from us. Therefore on this score also we decline to interfere with the Commission's direction.

Challenge to multi year tariff:

28) One of the grievances of the appellant is that the tariff for the biomass energy generators has been determined for ten years. Although no regulations in this behalf has been framed. It is contended that the Commission ought to have first observed the working of a single year tariff to arrive at the base parameters and thereafter ought to have proceeded with multiyear tariff fixation as per regulations to be framed in that behalf. The appellant further contends that the Commission has since framed the Regulations but the same have not been made applicable to the present set of biomass energy producers.

29) We think that the appellant is being unnecessarily apprehensive. The Commission has taken realistic parameters and have proceeded to fix tariff and made other provisions for promotion of non-conventional energy sources as well as for hydel power. So far as biomass generators are concerned, the Commission has fixed not only fixed charges separately for each year but also variable charges separately for each year. Gradual fall in the average cost of production has also been taken note of while fixing the tariff for a long duration. The Commission has further added in the last paragraph that the parameters decided in the impugned order shall be applied for the base year of 2005-06 and shall be reviewed after five years from the base year except for O&M expenses which shall be reviewed after three years from the base year. Since the

Regulations had not been framed the Commission had to proceed on the generally accepted principles. The Regulations have since been framed. However, Regulations do not have retrospective effect and the impugned order is not affected by the Regulations. The appellant cannot have any grievance in this regard. The Commission cannot be faulted for coming out with impugned order which is applicable for ten years with the aforesaid revisions.

30) In view of our above findings, except in the plea against common tariff for biomass energy producers, we do not find any merit in any of the two appeals. Hence the appeal No. 48 of 2007 is dismissed. Subject to modification of the impugned order, as indicated in paragraph 20 above, the appeal No. 61 is also dismissed.

31) All IAs also stand disposed of.

32) Pronounced in open court on this ***06th November, 2009.***

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member

Reportable✓ / Non-reportable